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No. 88-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELDON FUCHS, TERRY AGANS, ROBERT E. CARNDUFF, MARY C. DeGROOT, KENNETH E. HAUBOLD, RICHARD HAUBOLD, PAUL A. HENDRICKS, and ROBERT PEMBERTON, individuals, on their own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

RURAL ELECTRIC CONVENIENCE COOPERATIVE, INC., CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, and MARY E. BUSHNELL, CHAIRMAN of the ILLINOIS COMMERCE COMMISSION, an agency of the State of Illinois,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT RURAL ELECTRIC CONVENIENCE COOPERATIVE CO.'S BRIEF IN OPPOSITION

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QUESTIONS ACTUALLY PRESENTED

1. Whether a non-profit rural electric cooperative subject to regulation and supervision by both the Illinois Commerce Commission and the Rural Electrification Administration is entitled to state action exemption from the Sherman Act in a case brought by cooperative members seeking antitrust damages because of rate increases arising from a nuclear plant project, where the only antitrust violation alleged involves the service area agreement authorized pursuant to state statute and reviewed, approved and supervised by a state agency.

2. Whether a service area agreement entered into pursuant to clearly articulated and affirmatively expressed state policy and reviewed, approved and supervised by a state agency loses its character as state action because the state by statute has chosen not to regulate the rates set by member owned and governed not-for-profit electric cooperatives.

3. Whether the state action exemption from the federal antitrust laws applies only if the state always regulates the rates or prices of the party seeking the exemption.

4. Whether parties claiming federal antitrust violations by a rural electric cooperative can evade the state action exemption by deliberately bypassing procedures established by the state for active supervision of the cooperative's conduct.

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RESPONDENT RURAL ELECTRIC CONVENIENCE COOPERATIVE CO.'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.

RECC IS ENTITLED TO STATE ACTION EXEMPTION FROM THE FEDERAL ANTITRUST LAWS AS A HEAVILY REGULATED NON-PROFIT ELECTRIC COOPERATIVE.

The Seventh Circuit correctly held that the agreement between respondent Rural Electric Convenience Cooperative Co. ("RECC") and respondent Central Illinois Public Service Company ("CIPS") dividing service areas between them pursuant to the Illinois Electric Supplier Act, Ill. Rev. Stat. ch. 111⅔, §§ 401 *et seq.* ("ESA"), was exempt from the federal antitrust laws under the state action doctrine. Based upon undisputed facts, the Court of Appeals' reliance on the following factors was fully warranted:

(1) Petitioners admit that the RECC-CIPS service area agreement was in furtherance of a "clearly articulated and affirmatively expressed" state policy to displace competition. The Illinois Legislature passed the ESA "to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public. . . ." ESA § 402. The ESA froze the then current distribution pattern of electricity throughout the state. The Legislature prohibited the construction of new electric lines and the extension of service to new customers in areas served by other suppliers except upon the written consent of those other suppliers.

(2) In enacting the ESA, the Illinois General Assembly clearly established a policy that no customer shall be served by more than one electric supplier.

(3) On the same date that the Illinois General Assembly enacted the ESA, it also amended the Illinois Public Utilities Act to specifically exclude "electric cooperatives" from its definition of "public utility," thereby affirmatively expressing Illinois' policy not to regulate the rates of member owned and governed electric cooperatives. Illinois Public Utilities Act, Ill. Rev. Stat. ch. 111⅔, §§ 3-105, 3-119.[1]

(4) Although the RECC-CIPS service area agreement was reviewed and approved in 1969 by the Illinois Commerce Commission as in the public interest, petitioners made no attempt to have the Commission review this agreement prior to the filing of this antitrust action in 1986. The real reason for petitioners' complaint was their unhappiness with the higher rates that RECC had to charge because of the participation of RECC's principal wholesale power supplier, Western Illinois Power Cooperative, in Illinois Power Company's Clinton Nuclear Power Plant.

(5) The only restraint alleged in petitioners' complaint is the RECC-CIPS service area agreement itself. Petitioners have not alleged any antitrust violation that relates to the rates that RECC charges its consumer-members.

(6) The Illinois Legislature established elaborate procedures enabling challenges to the conduct of electric cooperatives that have entered into such service area agreements. ESA §§ 407, 408, 409, 410, 411, 412.[2]

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[1] The relevant portions of these sections of the Illinois Public Utilities Act are included in Appendix "A" to this brief.

[2] The ESA is reproduced in Appendix "B" to this brief.

(7) RECC's rates are controlled for all practical purposes by its agreements with the Rural Electrification Administration of the United States Department of Agriculture ("REA") which has financed RECC's electric distribution facilities and operations. Although REA does not "set" the rates to be charged by RECC, REA's financing agreements expressly require RECC to collect rates at sufficient levels to pay RECC's power supply, administrative and debt service expenses.

(8) RECC's only customers are its members, and they control RECC through democratic procedures. Therefore, it is exceedingly implausible that RECC's members would seek to violate the federal antitrust laws by charging themselves monopoly prices, especially since any margins above RECC's costs are automatically credited to its members' capital accounts.

Although petitioners do not and cannot legitimately dispute the foregoing facts and factors, they still maintain that the state action exemption should not apply because of an undefined conflict with this Court's prior decisions and also because petitioners maintain that the state action exemption should not apply unless the state actively regulates the rates or prices charged by the party seeking exemption. Petitioners can establish neither of these points.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OF THE CIRCUITS.

Petitioners' caption for their argument (Pet. 5) states that the Seventh Circuit decision below conflicts with this Court's prior decisions, but nowhere in the argument itself is the conflict identified. In fact, the Seventh Circuit's

decision here is clearly consistent with the state action principles previously established by this Court and uniformly applied by the lower federal courts.

Although this Court's holding in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), was confined to municipalities, the decision explained generally the relevant criteria for applying the state action exemption to non-private parties. The circuits are now applying *Town of Hallie* to cases involving parties not specifically covered by this Court's prior decisions. *See, e.g., Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987) (port authority); *Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Serv.*, 819 F.2d 910 (9th Cir. 1987) (charitable corporation controlling emergency medical services in county); *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986) (county aviation authority). To date, no conflict among the circuits has developed in applying *Town of Hallie* to circumstances beyond traditional municipalities.

The *Town of Hallie* standard for applying the state action exemption to non-private parties is a pragmatic one: As long as there is a strong state policy to displace competition, the state action exemption will apply provided there is "minimal danger" under all the circumstances that the party in question "will seek to further purely parochial public interests at the expense of more overriding state goals." 471 U.S. at 47. Each of the cases falling within the so-called "hybrid" category (*i.e.*, where the party asserting the state action exemption is neither a governmental entity nor a private, profit-making entity) involves a specific determination whether the circumstances pose a significant risk that consumers will be burdened by such "parochial interests" conflicting with the state's goals.

In this case, the Seventh Circuit's judgment that no such danger is present was fully justified because RECC "does not have the attributes of a purely private actor," 858 F.2d at 1217-1218, and this does not conflict with *Town of Hallie* or any other decisions.[3]

Petitioners attempt to mislead the Court by suggesting that in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378-379 (1973), and *Montana-Dakota Utilities Co. v. Williams Electric Cooperative, Inc.*, 263 F.2d 431 (8th Cir. 1959), the state action exemption was denied to rural electric cooperatives. In fact, neither case even involved the state action exemption. In *Otter Tail*, the only defendant was a private investor-owned utility, and unlike this case, there was no state policy authorizing service area agreements between utilities. In *Montana-Dakota*, the Eighth Circuit found that a state statute actually *prohibited* the service area agreement between a private utility and a rural electric cooperative.

Petitioners completely miss the point that the state action exemption is designed to give each state the freedom to determine its own policy with respect to such matters as the desirability of competition among suppliers of electricity. The federal courts do not sit to judge whether the Illinois General Assembly's decision to allow, indeed encourage, service area agreements is wise social or economic policy. *First American Title Co. of South Dakota*

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[3] RECC has many of the same attributes as a municipality. Not only does RECC have the power of eminent domain but its management and operations are controlled by its consumer-members who elect RECC's Board of Directors. Moreover, RECC operates on a strictly not-for-profit basis charging rates sufficient only to cover its power supply, administrative and debt service costs. Any margins earned in excess of these costs are automatically credited to its members' capital accounts.

v. South Dakota Land Title Ass'n, 714 F.2d 1439, 1453 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

III.

PETITIONERS' CLAIM THAT THE STATE ACTION EXEMPTION SHOULD APPLY ONLY IF RATES AND PRICES ARE REGULATED BY THE STATE IS UNWARRANTED.

The only restraint that petitioners have alleged in their complaint is the RECC-CIPS service area agreement. Petitioners have not alleged that RECC's rates violate the antitrust laws. Nevertheless, petitioners ask the Court to engraft a third principle in addition to the two rules that this Court has developed in its state action case law. According to petitioners, parties seeking a state action antitrust exemption should be required to prove not only (1) a strongly expressed state policy to displace competition and (2) active supervision by the state over the restraint in question, but also (3) state regulation of the rates or prices charged by the parties seeking exemption even if the alleged restraint does not involve price-fixing or price discrimination.[4] Petitioners cite no case holding that such rate regulation is required, nor do petitioners address any of the practical problems that such a ruling would entail. For instance, would the states be required to adopt full-fledged price-setting or rate-making procedures for every party subject to the state action exemption? Would Congress or the federal courts be required

[4] Any suggestion by petitioners that RECC has unbridled discretion to set rates is plainly wrong. As a member-owned and governed not-for-profit electric cooperative subject to exhaustive REA financial controls, RECC sets rates at the minimum level necessary to pay for its power supply, administrative and debt service expenses.

to establish the factors and parameters that would govern such price-setting or rate-making? Would the exemption be sufficiently justified if the parties in question had very limited discretion over prices and rates? As these issues indicate, petitioners' position, if adopted, would entail a significant federal intrusion into state policy-making areas and continuous litigation over the question whether the state procedures were adequate.

It is clear that in this case there is no basis for holding that the failure of the state to set RECC's rates mandates denial of a state action exemption. RECC's rates are closely controlled by both the REA and RECC's own members who have to pay the rates.

RECC's rates are largely dictated by its long-term contractual obligations to set its rates sufficiently high to repay its debt to REA.[5] REA's extensive control over RECC's rates is demonstrated by *United States v. Southwestern Electric Cooperative, Inc.*, 676 F. Supp. 897, 903 (S.D. Ill. 1987), *aff'd*, No. 88-1695 (Feb. 8, 1989),[6] in which

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[5] The Federal Power Commission ("FPC") in *In re Dairyland Power Cooperative, et al.*, 37 FPC 12, 18 (1967), held that it lacked the authority to regulate rural electric cooperatives because of the "extensive and rigid supervision and control" exercised by REA over its borrowers. The FPC explained REA's control over the rates charged by cooperatives:

> "All of [the cooperative's] contracts, including those for the purchase and sale of electric energy, must be approved by REA, and by this means REA controls the rates the cooperative pays and the rates it charges."

See also Salt River Project Agr. Dist. v. Federal Power Commission, 391 F.2d 470, 473 (D.C. Cir.) *cert. denied*, 393 U.S. 470 (1968), which held "REA exercises extensive supervision over the planning, construction and operation of the facilities it finances."

[6] The Seventh Circuit's slip opinion in *Southwestern* is included in Appendix "C" hereto.

an Illinois rural electric cooperative had refused to pay higher rates caused by the same Clinton nuclear power plant in which RECC's power supplier invested. REA filed suit to enforce its contracts, and the district court held that the cooperative was contractually bound to pay the higher rates.[7]

Petitioners have also failed to identify one plausible reason RECC's members would seek to violate the antitrust laws to impose higher rates upon themselves. RECC has nothing to gain financially through setting rates since all margins in excess of actual costs are credited to its members' capital accounts. RECC has caused no injury to the public, much less the very specific type of injury that the federal antitrust laws were intended to prevent or remedy. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

IV.

PRACTICAL CONSIDERATIONS REQUIRE DENIAL OF THE PETITION.

There are significant practical reasons why this case does not present issues suitable for review by this Court.

(1) This case involves the unusual feature of extensive federal involvement through REA in regulating and supervising the operations of the party seeking the state action exemption. The state has in effect deferred to the

[7] Once REA and RECC had entered into their financing arrangements and executed contracts requiring rates to be sufficient to repay REA's loans, the state could not have required lower rates through *ex post facto* legislation. Under such circumstances, REA would be entitled to preempt rate-making so that the federal interests would be protected. *See Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm.*, 461 U.S. 375, 389 (1983).

REA with respect to rural electric cooperatives' rates. Petitioners' statement of the questions presented (Pet. i) claiming "no regulation of the rates charged" by RECC is erroneous.

(2) Petitioners deliberately bypassed procedures established by the state to raise complaints about inadequate service by a rural electric cooperative under the Electric Supplier Act. Since those procedures were established to provide active supervision over the parties entering into a service area agreement, petitioners should not be allowed to "forum shop" and then claim lack of state supervision as an excuse to overturn Illinois' entire system for regulating electric suppliers and their service areas. Undoubtedly petitioners realized that by invoking such state procedures they would admit the active supervision of the RECC-CIPS service area agreement which would, in turn, validate RECC's state action exemption.

(3) This case in essence involves complaints by disgruntled RECC members about higher rates stemming from the participation of RECC's primary power supplier, Western Illinois Power Cooperative, in Illinois Power Company's Clinton Nuclear Power Plant. Such a dispute is primarily an internal cooperative matter. Petitioners do not claim that RECC lacked authority to enter into that project, that RECC's contracts do not require higher rates to meet Clinton's costs and RECC's resulting large debt to REA, or that RECC's contracts with REA are not binding. The remedies sought by petitioners would require RECC to breach its contracts with REA and default on debt repayment.

CONCLUSION

For the above reasons, RECC asks the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX "A"

ILLINOIS PUBLIC UTILITIES ACT

3-105. Public utility

§ 3-105. "Public utility" means and includes, except where otherwise expressly provided in this Section, every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

a. the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water;

b. the disposal of sewerage; or

c. the conveyance of oil or gas by pipe line.

"Public utility" does not include, however:

. . .

3. electric cooperatives as defined in Section 3-119 . . . .

3-119. Electric cooperative

§ 3-119. "Electric cooperative" is any electric cooperative which is subject to the Electric Suppliers Act, enacted by the 74th General Assembly, and has the same meaning as is defined in Section 3.4 of that Act.

APPENDIX "B"

ILLINOIS ELECTRIC SUPPLIER ACT

§ 401. Short title

This Act shall be known and may be cited as the "Electric Supplier Act".

§ 402. Legislative declaration

The General Assembly declares it to be in the public interest that, in order to avoid duplication of facilities and to minimize disputes between electric suppliers which may result in inconvenience and diminished efficiency in electric service to the public, any 2 or more electric suppliers may contract, subject to the approval of the Illinois Commerce Commission, as to the respective areas in which each supplier is to provide service.

§ 403. Terms defined

As used in this Act, unless the context otherwise requires, the terms specified in Sections 3.1 through 3.17 have the meanings ascribed to them in those sections.

§ 403.1 Adequate

"Adequate" lines or facilities means having sufficient capacity to meet the maximum estimated service requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated service requirements of other actual customers to be supplied therefrom during such year and to assure such customers of reasonable continuity of service. Facilities or lines are "adequate" even though the electric supplier must increase their capacity if the supplier will undertake to make its facilities and lines meet such service requirements, and can reasonably do so, within such time as meets the customer's requirements.

§ 403.2 Commission

"Commission" means the Illinois Commerce Commission.

§ 403.3 Customer

"Customer" means any person receiving electricity for any purpose from an electric supplier.

§ 403.4 Electric cooperative

"Electric Cooperative" means (a) any not-for-profit corporation or other person that owns, controls, operates or manages, directly or indirectly, within this State, any plant, equipment or property for the production, transmission, sale, delivery or furnishing of electricity and (b) that either is or has been financed in whole or in part under the federal "Rural Electrification Act of 1936" and the Acts amendatory thereof and supplementary thereto, or is directly or indirectly caused to be formed by any one or more such not-for-profit corporations or other persons that is or has been so financed.

§ 403.5 Electric supplier or supplier

"Electric Supplier" or "Supplier" means an electric cooperative or a public utility which furnishes electric service.

§ 403.6 Existing line

"Existing line" means any line of an electric supplier which on the effective date of this Act is (a) in existence or (b) is under construction, as determined in accordance with accepted engineering practices. The term includes any such line which one electric supplier may acquire from another electric supplier after such effective date.

§ 403.7 Extension

"Extension" means any new construction which increases the length of an existing line laterally or otherwise.

§ 403.8 Incorporated municipality

"Incorporated municipality" means any city, village or incorporated town.

§ 403.9 Line

"Line" means any electric line or cable whether overhead or underground.

§ 403.10 Normal service connection point

"Normal service connection point" means that point on a customer's premises where an electric connection to serve such premises would be made in accordance with accepted engineering practices. In the case of an incorporated municipality which is a customer, "normal service connection point" means that point within the corporate limits of the municipality where an electric connection to serve that municipality would be made in accordance with accepted engineering practices, or, if such connection is to be made outside the corporate limits, that point where the line from such connection crosses the corporate limits.

§ 403.11 Person

"Person" includes an individual, corporation, partnership, electric cooperative, public utility, association, joint stock company, trust, incorporated municipality, municipal corporation, and any governmental entity or political subdivision thereof.

§ 403.12 Premises

"Premises" means a physical area (a) which, except for any intervening public or private rights of way or easements, constitutes a single parcel or unit and (b) which a single customer owns, uses or in which it has some other interest in connection with receiving service at one or more points of delivery.

§ 403.13 Proximity

"Proximity" means that distance which is shortest between a proposed normal service connection point and a point on an electric supplier's line, which is determined in accordance with accepted engineering practices by the shortest direct route between such points which is practicable to provide the proposed service.

§ 403.14 Public utility

"Public Utility" has the same meaning as is defined in Section 10.3 of the Public Utilities Act.

§ 403.15 Public utilities act

"Public Utilities Act" means "An Act concerning public utilities", approved June 29, 1921, as heretofore or hereafter amended.

§ 403.16 Service

"Service" means electric service.

§ 403.17 Service area

"Service area" means that area, defined in an agreement between electric suppliers, which has been approved by the Commission, in which an electric supplier is entitled to furnish service, as provided in Section 6.

§ 404. Map of existing supplier's lines

By October 1, 1965, or within such further reasonable time as may be fixed by the Commission, each electric supplier shall make and file with the Commission such map or maps as will clearly indicate the location in this State of the supplier's existing lines. On November 1, 1965, or within such further reasonable time as the Commission may determine, the Commission shall find to be accurate those maps to which no objection has been filed

under this Section. If before November 1, 1965, or before the end of such a reasonable time period determined by the Commission, an electric supplier who may be adversely affected by an inaccurate map files with the Commission a written objection to any map, the Commission shall set a hearing on such map or maps and give reasonable notice to the electric supplier filing the map and to the supplier filing the objection. At the hearing, the Commission shall determine on the basis of the evidence presented whether or not each map is accurate. After its determination the Commission shall find to be accurate each map in question or require that a revised map, made in accordance with its determination, be promptly filed which when filed shall be found to be accurate by the Commission.

No public utility is required, however, to file a map showing its existing lines in any county in which there are no existing lines of an electric cooperative and which is not adjacent to a county in which there are existing lines of an electric cooperative; and no electric supplier needs to indicate on such a map, except as otherwise required by the Commission, any existing line which is more than 5 miles away from an existing line of another supplier.

No electric supplier is required to file a map showing its existing lines in any incorporated municipality except that, if 2 or more electric suppliers are furnishing electric service on the effective date of this Act in any incorporated municipality, each such supplier shall file a map showing the location of its existing lines in the portion of the incorporated municipality where those lines are adjacent to the existing lines of another electric supplier.

Such maps found to be accurate by the Commission as provided in this Section are public records of the Commission and are prima facie evidence of the location of the existing lines thereon portrayed.

§ 405. Furnishing service—New lines

Each electric supplier is entitled, except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, to (a) furnish service to customers at locations which it is serving on the effective date of this Act, (b) furnish service to customers or premises which it is not now serving but which it had agreed to serve under contracts in existence on the effective date of this Act, and (c) resume service to any premises to which it has discontinued service in the preceding 12 months and on which are still located the supplier's service facilities.

Except as otherwise provided in this Act or (in the case of public utilities) the Public Utilities Act, no electric supplier may construct new lines, or extend existing lines, to furnish electric service to a customer or his premises which another electric supplier is entitled to serve, as provided in this Section, except with the written consent of such other electric supplier subject to the approval of the Commission as to such consent, if required.

This Section does not deprive an electric supplier of any right to furnish permanent service under a contract existing on the effective date of this Act to premises receiving temporary service from another supplier on the effective date of this Act.

Nothing in this Section prevents a generation and transmission electric cooperative from furnishing service to its member distribution electric cooperatives which are not incorporated municipalities.

§ 406. Contracts between electric suppliers defining and delineating service areas

Any 2 or more electric suppliers may contract together defining and delineating, as between themselves, one or more service areas in which each such contracting supplier shall be entitled to furnish service. Such contracts are subject to the approval of the Commission.

§ 407. Extension of existing or construction of new lines—Notice to suppliers adversely affected—Complaint—Application of section

Except as otherwise provided in this Act, until the respective service areas of the affected electric suppliers have been determined as provided in Section 6, no electric supplier may make an extension of existing lines or construct new lines for the purpose of furnishing service to a customer or premises which it is not entitled to serve under Section 5, or furnish service to any customer or premises which such supplier is not entitled to serve under Section 5, unless in any such case such electric supplier gives written notice to the electric supplier or suppliers which may be adversely affected by the proposed construction, extension or service. Any electric supplier which claims that it should be permitted to serve any customer or premises which could be served by such proposed construction, extension or furnishing of service may within 20 days after receipt of such notice or, if no notice is received, not later than 18 months after the completion of such proposed construction, extension or the commencement of service, file its complaint with the Commission which shall proceed to determine the issue as provided in Section 8.

The electric supplier giving such notice may, however, commence such construction, extension or service, subject to the subsequent final determination of the Commission as to which supplier should be permitted to furnish such service.

This Section does not apply to and no notice need be given under this Section by (1) a public utility constructing new lines, extending existing lines or furnishing service in any county in which there are no existing lines of an electric cooperative and which is not adjacent to any county in which there are existing lines of an electric cooperative or constructing new lines, extending existing lines or furnishing service more than 5 miles away from an existing line of an electric cooperative; (2) a gen-

eration and transmission electric cooperative making a construction or extension of lines solely to serve its member distribution electric cooperatives which are not incorporated municipalities; (3) any electric supplier constructing new lines or extending existing lines to furnish service exclusively to its own property and for its own use; and (4) any electric supplier making, for the purpose of furnishing service to a customer, an extension of 300 feet or less of line having a voltage of 600 volts or less which does not make the service of that supplier any nearer to the existing lines of another supplier than at the effective date of this Act.

§ 408. Hearing and determination as to which of suppliers should furnish proposed service

When a complaint has been filed as provided in Section 7, the Commission shall proceed, after reasonable notice to the suppliers concerned, to a hearing to determine which of the suppliers is entitled or should be permitted under this Act to furnish the proposed service. The Commission shall first determine whether temporary service should be authorized and may issue a temporary authorization to a supplier permitting the making of extensions and furnishing of service while the dispute is pending. The Commission shall then make its determination as to which supplier is entitled or should be permitted under this Act to furnish the proposed service. In making this determination, the Commission shall act in the public interest and shall give substantial weight to the consideration as to which supplier had existing lines in proximity to the premises proposed to be served, provided such lines are adequate. In addition, the Commission may consider, but with lesser weight, (a) the customer's preference as to which supplier should furnish the proposed service, (b) which supplier was first furnishing service in the area, (c) the extent to which each supplier assisted in creating the demand for the proposed service, and (d) which supplier can furnish the proposed service with the smaller amount of additional investment. The Commission, how-

ever, shall give no weight or consideration to the fact that any supplier has or has not been issued a certificate of public convenience and necessity in the area proposed to be served.

After making its determination, the Commission shall make findings of fact and render its decision as to which supplier is entitled or should be permitted to furnish the proposed service. The decision of the Commission constitutes an authorization to that supplier to render such service and revokes any temporary authorization granted by the Commission while the dispute was pending.

§ 409. Inadequacy of service—Discrimination—Refusal to serve—Complaint of customer—Hearing and determination

(a) Any customer receiving service from any electric supplier, which is not subject to the Public Utilities Act, who contends that he is not receiving adequate service from that supplier, or who contends that he is being discriminated against by that supplier, may complain to the Commission. If the Commission on hearing finds that the service is inadequate and that there is another supplier whose service would be adequate and who is willing to serve that customer, the customer shall be released to such other supplier unless the supplier against whom complaint is made makes its service to that customer adequate within a reasonable time to be fixed by the Commission. If there is no such other supplier the Commission may direct that service be made adequate. If the Commission finds on hearing that such customer is being discriminated against as compared with other customers of the electric supplier so supplying such customer, the Commission shall order such supplier to cease and desist from such discrimination.

(b) If any electric supplier, which is not subject to the Public Utilities Act, refuses to serve a customer whom it is obligated to serve and who has applied for service to the supplier in accordance with the supplier's standard

rules as to service, the Commission, on receiving a complaint from the customer and after a hearing thereon, may direct the supplier to serve that customer.

§ 410. Rules and regulations

The Commission shall make and adopt such reasonable rules and regulations as are necessary to enforce compliance with and to administer the provisions of this Act. Before the adoption of any such rule or regulation, or of any amendment thereof, the Commission shall set the rule, regulation or amendment for public hearing and shall give at least 30 days prior written notice of such hearing to all electric suppliers, accompanying such notice with a copy of each of the rules, regulations or amendments that the Commission proposes to adopt. The Commission shall prepare and make available to all electric suppliers, and to the public upon request, copies of all such rules and regulations and the amendments thereof.

§ 411. Enforcement of compliance with act

The Commission shall have the power and jurisdiction to, and shall, enforce compliance with this Act on complaint made by the electric supplier or customer or prospective customer aggrieved by any non-compliance with this Act and shall make such orders and take such action by appropriate court proceedings or otherwise which will secure compliance with this Act.

§ 412. Judicial review

Any final order or decision of the Commission may be reviewed as provided in the "Administrative Review Act", approved May 8, 1945, as heretofore or hereafter amended, and the rules adopted pursuant thereto.

§ 413. Eminent domain

An electric cooperative when it is found by the Commission that it is necessary so to do may proceed to take

or damage private property as provided by "An Act to provide for the exercise of the right of eminent domain", approved April 10, 1872, as heretofore or hereafter amended. The requirement of such finding by the Commission is not to be construed to require authorization by the Commission of the facility for which the authorization to use eminent domain is sought.

§ 414. Areas located within incorporated municipalities

Except as otherwise provided in this Section, Sections 5 (other than the first paragraph thereof), 7 and 8 of this Act do not apply to any area which is located within an incorporated municipality on the effective date of this Act and shall cease to apply to any area after it is annexed to or otherwise becomes located within an incorporated municipality. An electric supplier which is serving in an area which has been or hereafter becomes annexed to or otherwise located within an incorporated municipality may continue to furnish service within such annexed or otherwise incorporated area to the premises which it is serving at the time of such annexation or incorporation provided that: (i) no such supplier may extend its lines into any area previously or subsequently annexed or otherwise located within the incorporated municipality in which another electric supplier is authorized to maintain and extend its lines unless in any such case the electric supplier is or shall become authorized to do so by the incorporated municipality and the Commission; (ii) no such supplier serving in an area which has been previously annexed to or otherwise located in an incorporated municipality prior to the effective date of this Act may extend its lines within such annexed or otherwise incorporated area unless in any such case the electric supplier is or shall become authorized to do so by the incorporated municipality and the Commission; and (iii) no such electric supplier which is serving in an area which becomes so annexed to or otherwise located within an incorporated municipality after the effective date of this Act may furnish service to any additional premises or extend its lines into or within such

area unless such supplier is or shall become authorized so to do by the incorporated municipality. In making a determination under clause (i) above the Commission shall act in the public interest and shall consider all the factors set forth in Section 8 but shall not be required to give substantial weight to any particular factor and shall take into consideration any applicable certificate of public convenience and necessity. In making a determination under clause (ii) above the Commission shall act in the public interest and shall consider all the factors set forth in Section 8, shall not be required to give substantial weight to any particular factor and shall not take into consideration any certificate of public convenience and necessity.

Nothing in this Section requires any electric supplier to obtain any authorization, either from an incorporated municipality or from the Commission, to extend its lines if, and to the extent that, such supplier, on the effective date of this Act, has such authorization from such municipality or from the Commission under the Public Utilities Act, as the case may be, or as a matter of law, but any such authorization must be lawfully in effect at that time.

Nothing in this Act shall be construed to impair, abridge, or diminish in any way the powers, rights and privileges of incorporated municipalities.

§ 415. Rights and obligations of public utilities as between themselves

The rights and obligations of public utilities as between themselves shall not be affected by this Act except as provided by the Public Utilities Act.

§ 416. Penalty

Any electric supplier which violates any provision of this Act shall, upon conviction thereof, be subject to a fine of not less than $500 nor more than $2,000.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88-1695

UNITED STATES OF AMERICA, NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION and SOYLAND POWER COOPERATIVE, INC.,

Plaintiffs-Appellees,

v.

SOUTHWESTERN ELECTRIC COOPERATIVE, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 86 C 3419—**William D. Stiehl**, *Judge.*

ARGUED NOVEMBER 28, 1988—DECIDED FEBRUARY 8, 1989

Before CUMMINGS and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

CUMMINGS, *Circuit Judge.* This action was filed by the United States (on behalf of the Rural Electrification Administration (REA)), the National Rural Utilities Cooperative Finance Corporation (CFC), and Soyland Power

Cooperative, Inc. (Soyland) against Southwestern Electric Cooperative, Inc. (Southwestern). The plaintiffs sought a declaration that the 1976 contract under which Southwestern promised to purchase all its electric power requirements from Soyland until 2015 is binding and enforceable. Southwestern counterclaimed for a declaration that the contract is void under the doctrines of mutual mistake of fact and frustration of purpose.

The plaintiffs filed a motion for summary judgment and Southwestern filed a cross-motion for partial summary judgment. On December 28, 1987, the district court released a memorandum opinion holding that plaintiffs' motion for summary judgment should be granted and that Southwestern's counterclaim should be dismissed and its cross-motion for partial summary judgment should be denied. 676 F. Supp. 897.

The REA is a government agency which makes or guarantees loans to implement the rural electrification program encompassed by the Rural Electrification Act (7 U.S.C. §§ 901-950(b)). Plaintiff CFC, a not-for-profit District of Columbia association of mostly rural electric cooperatives created to supplement the REA loan programs, has similar interests to REA's. Soyland and Southwestern are members of CFC.

Since the passage of the Rural Electrification Act in 1936, the REA has financed approximately 800 distribution cooperatives across the nation. The members of those cooperatives are rural consumers to whom the cooperatives distribute electric power. Southwestern, located in Greenville, Illinois, has been serving as such a cooperative since 1939.

Soyland, whose principal office is in Decatur, Illinois, is one of 60 generation and transmission cooperatives also financed by the REA loan program. Generation and transmission cooperatives sell their power wholesale to their member distribution cooperatives, such as Southwestern. Although organized in 1963, Soyland was inactive until 1975.

In 1975 Southwestern and fourteen other distribution cooperatives decided to acquire an 8.42% interest[1] in the Clinton Power Station,[2] a nuclear generating plant to be built in DeWitt County, Illinois, by the Illinois Power Company of Sangamon County, Illinois. Soyland was chosen as both the entity through which they would acquire that interest and the generation and transmission cooperative for the fifteen distribution cooperatives' share of the power to be generated by the Clinton plant.

The construction of the plant was marred by a series of delays and cost increases. Although commercial production of power from the Clinton plant was scheduled to commence in June 1980, production of power did not commence until November 1987 (Soyland Br. 8-9). Construction cost estimates of the plant rose from an initial projection of $361,195,000 in February 1976 to $666,654,000 in August 1976 and then to $3,250,000,000 in November 1985. The final cost of the power plant upon completion exceeded $5,000,000,000.

Southwestern and the other fourteen distribution cooperatives acquiring an ownership interest in the Clinton plant financed their acquisition through loans to Soyland made or guaranteed by REA and CFC. By March 1986, REA had advanced $23,815,000 to Southwestern for construction of its electrical distribution system and CFC had loaned it an additional $5,838,000 for the same purpose. Substantial amounts of these loans remain outstanding (663 F. Supp. at 539). REA has also guaranteed the repayment of $480,000,000 in construction loans made to Soyland of which $474,000,000 is still outstanding. Similarly

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[1] This is the percentage interest stated in Southwestern's brief (at p. 9) and may not represent the current interest. In Soyland's state litigation with Illinois Power, the 1977 interest is stated as 10.5% (Southwestern App. J at 3).

[2] In August 1976, Soyland and Western Illinois Power Cooperative, Inc., contracted with Illinois Power Company to have it build the plant.

CFC has advanced $63,000,000 to Soyland, and $58,707,606 remains outstanding (Soyland Br. 5).

As a condition of making these loans to Soyland, REA and CFC required Southwestern and its fourteen sister distribution cooperatives to execute long-term all-requirements wholesale power contracts with Soyland. Under these contracts, the fifteen cooperatives promised to purchase all their power from Soyland at a rate based on the maintenance and generation of power costs, as well as retirement of the debt incurred in construction of the plant as specified in paragraph 4(b) of the contract (676 F. Supp. at 901-902). As a result of keying the pricing formula to the cost of the plant construction, the cost of electricity supplied by the plant to distribution cooperatives such as Southwestern greatly exceeded the projected rates.

All-requirements contracts, such as the Soyland-Southwestern one, secure approximately $40 billion in loans committed by REA to cooperatives throughout the country. As Judge Stiehl found in his first memorandum opinion in this case, this particular long-term all-requirements contract, which REA and CFC required Southwestern and Soyland to negotiate, remains the primary security to ensure the repayment of the extremely large loans which REA and CFC made to Soyland and Southwestern. 663 F. Supp. at 540. He concluded that requiring Southwestern and Soyland to enter into this contract to secure their loans was within the power of the REA administrator under 7 U.S.C. § 904. 663 F. Supp. at 541.

The particular all-requirements contract involved in this lawsuit was executed by Southwestern and Soyland on May 26, 1976. According to Southwestern, Soyland started selling power to Southwestern under this contract in 1983. (Southwestern Br. 15.) On March 24, 1986, Southwestern executed a "deferral agreement" with Soyland, postponing until December 31, 1986, Southwestern's obligation to make further payments commencing with the March 1986 billing. Soyland's complaint admits that Southwestern paid

Soyland for power under the contract from March 1984 through October 1985, but alleges that Southwestern remains in arrears in its payments under the requirements contract; Southwestern denies this arrearage in its pleadings.

In February 1986 Southwestern filed a suit in the Circuit Court of Madison County, Illinois, seeking a judgment that the requirements contract between it and Soyland is void. In that action Southwestern raised similar affirmative defenses and a counterclaim seeking relief similar to the present lawsuit. The state action was later voluntarily dismissed by Southwestern after this action was filed in federal court. Southwestern is the only one of Soyland's fifteen members seeking rescission of its requirements contract with Soyland.

Judge Stiehl handed down two memorandum opinions in this case. The first opinion held that the United States (on behalf of the REA) and CFC had standing to join Soyland in bringing this declaratory judgment action against Southwestern. 663 F. Supp. 538. That holding is not questioned on appeal. The second opinion, which is the basis of this appeal, held that the contract between Soyland and Southwestern is valid and enforceable and therefore rejected Southwestern's arguments that the contract was void on the basis of mutual mistake of fact or frustration of purpose. 676 F. Supp. 897. We affirm.

Introduction to Decision

In *Fuchs v. Rural Electric Convenience Cooperative, Inc.*, 858 F.2d 1210 (7th Cir. 1988), we recently held that a contract between Rural Electric Convenience Cooperative and Central Illinois Public Service Company dividing service areas pursuant to the Illinois Electric Supplier Act was not invalid under the federal antitrust laws. That panel opinion contains a footnote (pp. 1212-1213) which reveals the implications of Southwestern's attempt to void the contract at issue. It provides as follows:

> 8 This dispute is apparently but one variation of the periodic conflicts occurring between co-op customers

and their electricity suppliers. When Congress enacted the REA in 1936, ninety percent of rural residents were without electric power. The REA (along with the National Rural Utilities Cooperative Finance Corporation, which provides additional financing to supplement the REA's loan and loan guarantee program) provided the loan capital for the construction of facilities, the extension of lines, and the generation and transmission of power in sparsely populated areas "which the investor-owned utilities had not found it profitable to service." *Salt River*, 391 F.2d at 473. Total cumulative government financing of rural electrification approaches $50 billion. The co-ops pay for these loans through their member/consumers' electric rates. Now that the rural electric systems are almost universally in place, but not paid for, some co-op customers are disgruntled with their rates, which necessarily reflect the amortization cost of the system.

Consequently, distribution co-ops have tried to sell their assets to neighboring investor-owned utilities, *Tri-State Generation and Transmission Assoc., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986), or to void their long-term contracts with co-op suppliers whose rates are higher than neighboring utilities. *United States v. Southwestern Electric Coop.*, 663 F. Supp. 538 (S.D.Ill. 1987). The withdrawal of any distribution co-op from the system necessarily shifts the fixed costs of the electricity (represented by the debt service) to the other members of its generation and transmission cooperative and raises the possibility of default, with potentially disastrous results for the system. *See Tri-State*, 805 F.2d at 357. It is clear that somebody will have to retire the debt of the rural electrification system; if co-op customers like plaintiffs succeed in removing themselves from the REA structure in large enough numbers to precipitate default, the costs may eventually be shifted to federal taxpayers.

Mutual Mistake

Southwestern's principal argument for avoiding the May 1976 requirements contract with Soyland is based on the doctrine of mutual mistake.[3] The elements of the doctrine of mutual mistake were set forth recently in *John Burns Construction Co. v. Interlake, Inc.*, 105 Ill. App. 3d 19, 433 N.E.2d 1126 (1st Dist. 1982). In *John Burns*, the trial court rescinded the contract there because of mutual mistake (105 Ill. App. 3d at 24) and the Appellate Court of Illinois affirmed because it said the requisite four elements for mutual mistake were satisfied. Those elements were stated as: (1) the alleged mistake must relate to a material feature of the contract, (2) unconscionability, (3) exercise of reasonable care by the party seeking rescission and (4) the party opposing rescission can be placed in *status quo*.[4] 105 Ill. App. 3d at 25. After reciting these requirements of Illinois law, the district judge added that *Casanas v. Nelson*, 140 Ill. App. 3d 341, 346, 489 N.E.2d 358 (2d Dist. 1986), holds that rescission on the basis of mutual mistake will also not be permitted in Illinois unless "clear and positive evidence" exists demonstrating mutual mistake. 676 F. Supp. at 905.

The fatal difficulty with Southwestern's argument is that while the parties to that contract may have been mistaken about the future costs of construction of the Clinton power plant, the doctrine of mutual mistake does not cover an erroneous "prediction or judgment as to events to occur

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[3] Both parties have conceded that Illinois law controls construction of the contracts in question since they were made in Illinois and do not provide otherwise.

[4] Southwestern argues that these are really the standards for a unilateral mistake. We need not decide the point, but do note that the authorities cited in *John Burns* are unilateral mistake cases. *Santucci Construction Co. v. County of Cook*, 21 Ill. App. 3d 527, 531, 315 N.E.2d 565 (1974); *People ex rel. Dept. of Public Works v. South East National Bank of Chicago*, 131 Ill. App. 2d 238, 241, 266 N.E.2d 778 (1971).

in the future." Restatement (Second) of Contracts § 151*a*. Applying Illinois law, this Court has held in rejecting an asserted mutual mistake claim, "it must be a mistake of a present or a past fact." *Price v. Trunkline Gas Company*, 323 F.2d 394, 396 (1963) (applying Illinois law); see also *S.T.S. Transport Service v. Volvo White Truck Corp.*, 766 F.2d 1089, 1093 (7th Cir. 1985) (also applying Illinois law); *Purvines v. Harrison*, 151 Ill. 219, 224, 37 N.E. 705 (1894); *Casanas v. Nelson*, 140 Ill. App. 3d 341, 347, 489 N.E.2d 358 (2d Dist. 1986); *Boyd v. Aetna Life Insurance Co.*, 310 Ill. App. 547, 555, 35 N.E.2d 99 (4th Dist. 1941). The cost of constructing the power plant when the parties entered into the all-requirements contract at issue was estimated to be $666,654,000, nearly double Illinois Power Company's first published cost estimate in February 1973 of $361,195,000. The 1976 figure of $666,654,000 was clearly nothing more than a projection or estimate of the final cost.

Additionally, after signing the requirements contract, Southwestern and the other members of Soyland authorized it to enter into the August 1976 agreement with Illinois Power Company for the construction of the Clinton plant.[5] Paragraph 8.9 of that construction agreement recognized that the estimated cost of that plant was uncertain and subject to change, for it provided:

> *Cost changes.* The Participants are aware that the estimated costs of the Clinton Station (including cost of fuel) are subject to change by reason, among other matters, of inflation, compliance with additional governmental requirements, design and equipment changes, and delays in construction and commencement of operation. (IV D. Ct. App. 1033.)

[5] See p. 2 of Soyland's May 28, 1976, Board minutes (reproduced between pages 776 and 777 of volume IV D. Ct. App.). Western Illinois Power Cooperative, Inc., joined in the contract. See note 2 *supra*.

Therefore, Southwestern's claim that it should not bear the risk of cost changes cannot be sustained. Indeed the rate provision in paragraph 4(b) of the all-requirements contract between Southwestern and Soyland was keyed to Soyland's generating plant costs (676 F. Supp. at 901-902), undermining Southwestern's present position that it is entitled to rescission. Southwestern has not attempted to satisfy requirement (2) or (4). Therefore we need not consider requirement (3) or whether the district judge correctly concluded that requirement (1) had also not been satisfied.

Southwestern argues that the standard set forth in the Restatement (Second) of Contracts § 152, should govern rather than the *John Burns* test which, according to Southwestern, should only apply to unilateral mistake cases. That argument is futile because, as shown *supra*, the rules governing rescission for either mutual or singular mistake are inapplicable where, as here, a party's erroneous prediction or judgment as to future events is involved. *Idem* § 151*a*.

In the district court, Southwestern attempted to introduce as evidence of a mutual mistake admissions contained in pleadings filed in an unrelated case commenced by Soyland against the plant construction company in state court.[6] In that case, Soyland alleges that Illinois Power Company's project manager's deficient performance was the cause of the tenfold increase in projected construction costs and that Illinois Power Company misrepresented the cost estimates. Southwestern claims that Soyland should be estopped from denying that a mutual mistake exists between Southwestern and Soyland since Soyland alleges in the state court action that it relied upon these allegedly misrepresented figures in entering into the construction agreement. The district court appropriately rejected Southwestern's argument, since Soyland's suit in state court only

[6] *Soyland Power and Western Illinois Power v. Illinois Power*, 86-L-373, was filed in state court in Sangamon County, Illinois.

demonstrates that the estimate of the construction cost of the plant was mistakenly projected by all parties concerned. This does not change the fact that the mistake in this case involved an error in judgment rather than any error in fact.[7]

Frustration of Purpose

Southwestern also asserted in the district court that the contract is voidable under the doctrine of frustration of purpose. In this Court, the argument is pressed much less vigorously, probably because Judge Stiehl recognized that under Illinois law the defense is not to be applied liberally and the party seeking rescission must show that (1) the frustrating event was not reasonably foreseeable and (2) the value of counterperformance has been totally or nearly totally destroyed by the frustrating event, following *Northern Illinois Gas Co. v. Energy Co-Op, Inc.*, 122 Ill. App. 3d 940, 952, 461 N.E.2d 1049 (3d Dist. 1984). Southwestern has been unable to cite any contrary Illinois or federal case. Indeed, in *Northern Indiana Public Service v. Carbon County Coal*, 799 F.2d 265, 278 (1986), this Court rejected the defense of frustration of purpose where, as here, the contract in question allows for escalation of price. As we stated there, "[i]f, as is also the case here, the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back

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[7] *Aluminum Company of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) ("Alcoa"), on which Southwestern principally relies, is inapposite because it was purportedly controlled by Indiana law (at pp. 59-60). Moreover, the case has "faded into obscurity." Halpern, Application of the Doctrine of Commercial Impracticability: Searching for the "Wisdom of Solomon," 135 U. Pa. L. Rev. 1123, 1127 (1987). Finally, *Alcoa* does not apply where, as here, both parties entered into the requirements contract with conscious ignorance of the eventual higher construction cost of the Clinton plant and where that factor did not enrich Soyland. *Matter of Westinghouse Elec. Corp., etc.*, 517 F. Supp. 440, 459 (E.D. Pa. 1985).

to the seller by invoking impossibility or related doctrines" such as frustration of purpose. *Northern Indiana*, 799 F.2d at 278.

Similarly, in *Neal Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974), the Canadian government caused a rise in potash prices which defendant supplier claimed to excuse its nonperformance. However, we held that the fact that the performance became economically burdensome was not sufficient to excuse performance. Other more recent cases denying the frustration of purpose defense in circumstances similar to those here include *United States v. Great Plains Gasification Associates*, 819 F.2d 831 (8th Cir. 1987), certiorari denied, 108 S. Ct. 285, and *Langham Hills Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327 (4th Cir. 1987).

The only argument Southwestern presents in opposition to these authorities is that this defense should have been considered by a jury rather than denied by the district judge. However, in all the foregoing cases, the defense was rejected by the trial judge and not presented to a jury. Perhaps this is why Southwestern's reply brief does not even touch upon the frustration of purpose defense.[8]

The decision of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[8] In view of our decision that Southwestern was not excused from performance on the ground of mutual mistake or frustration of purpose, there is no need to consider Southwestern's additional arguments that rescission would be inequitable or barred by estoppel.